2006

Robert and Jackie Face v. Beutler Enterprises, Inc., Mobilehome Transporters, and Byron Chester Mock : Brief of Appellant

Utah Court of Appeals

Robert and Jackie Face; pro se.
Terry M. Plant, H. Justin Hitt; Plant, Christensen & Kanell; attorneys for appellees.

IN THE UTAH COURT OF APPEALS

ROBERT AND JACKIE FACE, Plaintiffs/Appellants, V. BEUTLER ENTERPRISES, INC., MOBILEHOME TRANSPORTERS, AND BYRON CHESTER MOCK, Defendants/Appellees.	**BRIEF OF THE APPELLANTS** Utah of Appeals: 20060691

APPEAL FROM THE JUNE 28, 2006 ORDER OF THE
THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH, SALT LAKE DEPARTMENT
HONORABLE JUDGE DENISE P. LINDBERG

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AMENDMENT V OF THE UNITED STATES CONSTITUTION
No person shall…be deprived of life, liberty, or property, without due process of law; …, without due process of law.

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No person shall be deprived of life, liberty or property

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The Appellants Robert & Jackie Face respectfully submits our brief on appeal.

STATEMENT OF APPELLATE JURISDICTION

The Utah Court of Appeals has jurisdiction of this case pursuant to Sections 78-2-2 of the Utah Code Annotated, the Supreme Court has appellate jurisdiction over "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction" and "the Supreme Court may transfer to the Court of Appeals any matters over which the Supreme Court has original appellate jurisdiction."

STATEMENT OF THE ISSUES

The following issues require consideration by the Court as a result of the June 28, 2006 Order and Final Judgment by Judge Lindberg attached. The ultimate legal questions involve whether the district court abused its discretion in dismissing appellant's case with prejudice, whether imperative Rules of Civil Procedure under Rule 74. were violated in regard to withdrawal of counsel after certificate of readiness for trial had been filed, whether appellants, namely Robert L. Face an American with disability involving a brain injury unable to represent himself, rights of due process were violated and if as an accommodation under the Americans with

Disability Act the court erred in not ensuring that Robert L. Face maintain representation.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, OR RULES

UTAH STATE CONSTITUTION, Article I § 7;

UNITED STATES CONSITUTION, AMENDMENT V;

UNITED STATES CONSTITUTION, AMENDMENT XIV;

UTAH RULES OF CIVIL PROCEDURES, RULE 74 (2004).

STATEMENT OF THE CASE

This action is a personal injury case involving Mr. Robert Face and his wife Mrs. Jackie Face. Mr. Face was a productive hard working provider for his family employed by utility company for more than 25 years. Mr. Face worked his way up to a journeyman substation electrician status earning near a six figure income. Just at a point in the Faces lives when they were beginning to enjoying the fruits of their labors, an accident at the hands of respondents, turned there lives upside down. Mr. Face, now totally disabled, sustained a severe brain injury, leaving him helpless and dependant upon his wife and family for most and at times all of his needs and care. Mr. Face cannot work or represent himself. Mrs. Face cares for her husband and family while working endless hours to survive on a fraction of what Mr. Face was providing prior to injuries. In the pursuit of justice, we encountered our court system for the first time. While we have always held high regard to the important function our courts serve, errors encountered by the lower court has left us in dismay and disbelief. It is apparent to us that the lower court system was more interested in ramming our case to end than ensure protection of our right to be heard and have our day in court. It has been difficult to raise money and time for Robert to undergo all testing, diagnostic and evaluations necessary to properly assess causation of Robert's brain injury in relation to the accident and determine Robert's long term prospects. We believe that the complexities of this

case are unique, based upon limited knowledge in the area of Roberts type of brain injury, requiring more time than the average injury case. We know our case was actively pursued based upon costs and time expended up through shortly after settlement negotiations were under way. We believe that pressures applied by the lower court resulted with our counsel filing a questionable certificate of readiness for trial and then without justification or reason withdrew from the case absent our knowledge, consent or input. Said pressures also served to advantage respondent involving a large insurance company equipped with unlimited resources to retain high priced defense counsel not interested in justice but rather disposal of our case which was accomplished in just a little more than three years.

During one proceeding the court assured us that we would receive the time we need to find counsel, then respondents filed a motion to dismiss days after prospective replacement counsel contacted Mr. Plant. We only knew to file a motion for enlargement to allow counsel to respond considering Robert is unable to respond or represent himself and we were moving forward as we understood the court advised. At time of dismissal, our case was being reviewed by another prospective attorney. Respondent's motion to dismiss left out two important facts:

1) their counsel had been by prospective attorney contacted which verified we were actively pursuing replacement counsel; and

2) Judge Himonas stated in open court "No problem, I will give you the time you need." (relative to the obtainment of new counsel)

What law firm really wants a case prepared by other counsel all the way to a questionable certificate of readiness for trial which also has is subject to a lien? We submit that the court erred in allowing our counsel to withdraw in an arbitrary and capricious manner inconsistent with imperative provisions under Rule 74 Utah Rules of Civil Procedure. We also believe and the record reflects that both officers of the court misled and misrepresented facts resulting in errors. We have faith that checks and balances safeguarded through our higher courts will correct the injustice our case encountered upon having been dismissed with prejudice. Respondents inactions to move the case forward themselves, rather filing a motion to dismiss after we lost counsel, days after prospective replacement counsel contacted them, was not only unethical but also smacks of an ambush tactic.

STATEMENT OF FACTS

The statement of facts is based upon the record of this case in the pleadings of the parties, including memorandum and supporting addenda in the lower court.

1. 03-14-03: Complaint filed (R. 1-8);
2. 04-10-03: Answer filed (R. 9-13);

DISCOVERY PROCESS BASED UPON RECORD INDEX

3. 04-22-03: **PLAINTIFF'S** subpoenas records from American Fork Hospital & Work Care (R. 16-21);
4. 06-09-03: **PLAINTIFF'S** Rule 26 (a)(1) Initial Disclosures (R. 40-42);

5. 06-10-03: DEFENDANT'S Certificate of Service Initial Disclosures (R. 43);
6. 06-13-03: DEFENDANT'S Certificate of Service for Discovery (R. 44)
7. 06-16-03: **PLAINTIFF'S** Certificate of Service of Plaintiff's Rule 45 (b)(4) Request (R. 45-46);
8. 06-16-03: **PLAINTIFF'S** Certificate of Service of Plaintiff's Rule 26 (a)(1) Supplemental Initial Disclosures (R. 47-48);
9. 06-18-03: **PLAINTIFF'S** Certificate for Written Discovery and Notice of Deposition for Byron Chester Mock (R. 49-50);
10. 06-25-03: **PLAINTIFF'S** Certificate of Services of Plaintiff's Second Rule 45(b)(4) (R. 51-52);
11. 06-26-03: **PLAINTIFF'S** Certificate of Service of Amended Notice of Deposition of Defendant Byron Mock (R. 53-54);
12. 07-09-03: DEFENDANT'S Certificate of Service for Discovery (R. 55-56)
13. 07-28-03: **PLAINTIFF'S** Certificate of Service for Discovery (R. 59-60)
14. 08-06-03: DEFENDANT'S Notice of Deposition (R. 61-62);
15. 08-26-03: **PLAINTIFF'S** Certificate of Services of Second Amended Notice of Deposition (R. 63-64);
16. 08-26-03: **PLAINTIFF'S** Second Amended Notice of Deposition of Byron Mock (R. 65-66)

17.09-09-03: DEFENDANT'S Amended Notice of Deposition (R. 67-68);

18.10-06003: **PLAINTIFF'S** Certificate of Service for Written Discovery Second set of Production and Interrogatory and Notice of Deposition (R. 69-70);

19.10-28-03: **PLAINTIFF'S** Second Set of Supplemental Rule 26(a)(1) Initial Disclosures (R. 71-72;

20.11-03-03: DEFENDANT'S Notice of continued Deposition (R. 73-74)

21.11-07-03: DEFENDANT'S Certificate of Service for Discovery (R. 75);

22.11-11-03: DEFENDANT'S Amended Notice of continued Deposition (R. 76-77)

23.05-17-04: **PLAINTIFF'S** Certificate of Service of Plaintiff's Expert Witness designation (R. 91-92);

24.06-28-04: DEFENDANT'S Notice of Depositions (R. 93-96);

25.08-20-04: DEFENDANT'S Notice of Deposition (R. 97-98);

26.09-16-04: DEFENDANT'S Notice of Deposition (R. 99-100);

27.09-30-04: DEFENDANT'S Offer of Judgment (R. 101-102);

28.12-30-04: DEFENDANT'S Amended Notice of Deposition (R. 103-104);

29.08-15-04: **PLAINTIFF'S** Certificate of Readiness for Trial (R. 108-110);

30. Appellant was represented by Charles A. Gruber from the onset of the complaint up and through September 23, 2005. (See Index Record pages 1 - 8,

117 - 120) This representation was based upon a contractual agreement entered into between the parties.

31. Appellant Robert L. Face has a brain injury and the court was advised by his physician that he is unable to represent himself. (Index Record page 135) {Emphasis Added}

32. Discovery consisted of all phases of discovery. On September 15, 2005, a hearing took place, which was suppose to be a scheduling conference, however, no one can determine exactly what occurred at this time. (R.114-116)

33. Plaintiff timely requested a transcript of the September 15, 2005 hearing. (R. 176 - 177), however no transcript of the September 15, 2005 hearing has been produced. (R. 181 - 183)

34. On September 16, 2005, a hearing was held before Judge Deno Himonas without any notice to the appellants. (See index)

35. During September 16, 2005 hearing, Judge Himonas asked "… I understand, Mr. Gruber that you intend to withdraw. (Transcript September 16, 2005, hearing page 2, line 15 - 16)

36. Appellant's prior counsel responded, "I will withdraw at the direction of my clients, your Honor …." (Transcript September 16, 2005, hearing page 2, line 17 - 18)

37. At no time did appellants direct or consent to Charles A. Gruber withdrawal, nor does the record reflect that the appellants requested Mr. Gruber withdraw as appellants counsel. (See the transcript and record)

38. When Mr. Gruber stated, "my clients honestly want someone else." The Court responded, "I'm not concerned about that." and followed it up with "Yeah, not concerned about it at all." (Transcript September 16, 2005, hearing page 4, lines 1 - 4)

39. Respondent's counsel, who had been attempting to settle the case, acknowledged having conversation with Mr. Gruber concerning withdrawal of appellant's counsel by stating "… Mr. Gruber explained that yesterday very well." (Transcript September 16, 2005, hearing page 3, line 16)

40. Mr. Plant prompted the court to move forward. (Transcript September 16, 2005, hearing page 4, line 6 - 8)

41. The Court ordered, "So why don't we say 20 days from today in which to appear or appoint counsel." Well, let's have it 20 days from today in which to appear or appoint." (Transcript September 16, 2005, hearing page 4, line 9 - 10, 22 - 23, 25 - 26)

42. Mr. Plant verified that the court wanted "… And so let me make sure, your Honor, so I don't mess up the order, doing 3:30 on the 18th as a scheduling conference, and they have 20 days from today to appoint new counsel or

appear in person, right? The Court: "Yes"(Transcript September 16, 2005, hearing page 6, line 3)

43. The Court asked, "… if Mr. Gruber were to withdraw right now there would be an automatic 20 day period in which he would be required to give notice." (Transcript September 16, 2005, hearing page 6, line 8 -10)

44. Mr. Plant responded "Right." (Transcript September 16, 2005, hearing page 6, line 11)

45. On September 1, 2004, Mr. Gruber verified in writing the fact "that he would be there until the end." (R. 130 - 134)

46. On September 23, 2005, Mr. Gruber filed his notice of withdrawal. (R. 117 - 120)

47. On September 27, 2005, respondent's counsel filed Notice to appear or appoint counsel within 20 days. (R. 121 - 122)

48. On September 28, 2005, respondent's counsel obtained signature of Judge Himonas requiring plaintiffs to find new counsel or appear in person on or before October 5, 2005 while setting a scheduling conference to be held on October 18, 2005 at 3:30 p.m. to establish a discovery plan and if possible set the matter for trial. (R. 123 - 125)

49. Plaintiff's filed an ex-parte motion for enlargement of time to respond on October 17, 2005 along with attached affidavit and letter from Dr. Joe Murdock, M.D. (R. 128 - 135)

50. Court proceeded with hearing October 17, 2005.

51. Appellant Jackie Face informed the Court that "…We certainly do not want to be pro se." (Transcript October 17, 2005, hearing page 4, lines 10 - 11)

52. The Court responded "I understand, and I, … No problem, I'll give you the time that you need." "That's no problem. So why don't you – when you obtain Counsel if you would do me the courtesy -- (Transcript October 17, 2005, hearing page 4, lines 12, 14 - 15, 17- 18).

53. Jackie responded "Certainly will." (Transcript October 17, 2005, hearing page 4, line 19)

54. On February 14, 2006, respondent filed motion to dismiss for failure to prosecute. (R. 150 - 153)

55. Appellants filed motion for additional time to have new counsel respond to defendant's motion to dismiss and attached affidavit February 27, 2006. (R. 154 - 157)

56. After respondent noticed motion to dismiss for decision and having not received any response to pending motion for enlargement Ms. Face noticed for decision learning that case had been dismissed (Exhibit A).

SUMMARY OF ARGUMENT

Judge Lindberg erred by failing to show facts rising to the level which supports or justifies dismissal of our case with prejudice, considering our case involves a disabled person with a brain injury unable to act or represent himself. The lower court erred in granting respondents' motion to dismiss with prejudice, and by erroneously concluding that "any injustice resulting from this dismissal lies solely and exclusively with Plaintiffs." (R. 160 - 164) Judge Lindberg acknowledged "In fact, it is telling that they have not even attempted to respond to the Motion to Dismiss filed by Defendants in February 2006, other than to again ask for an extension of time." "Once their counsel withdrew, Plaintiff's received repeated extensions to appoint new counsel, all the while protesting that they could not represent themselves." (R. 160 - 164, paragraph 12 and 14).

Some of the pertinent facts not addressed in the memorandum decision include:

(1) plaintiff's counsel was allowed to withdraw in an arbitrary and capricious manner absent plaintiff's knowledge, consent or input (R. 130-134);

(2) The pending extension of time was seeking the court to allow new counsel to respond;

(3) Robert L. Face is disabled with a brain injury unable or in any condition to represent himself or respond (R. 135);

(4) both parties were involved in ongoing settlement discussions (101 - 102);

(5) new discovery involving causation of brain injury was being explored;

(6) complexities of a case involving a brain injury;

(7) Prior Judge Himonus statement "No problem, I will give you the time you need.";

(8) lower court failure to rule on pending motion for enlargement of time;

(9) respondent's counsel having failed to prepare an order as agreed and specifically instructed by the court during September 16, 2005 hearing;

(10) after certificate of readiness was filed respondents failures to take action in moving case forward, other than filing a motion to dismiss after plaintiff's lost their counsel; and

(11) No hearing having been held in relation to disposing of plaintiff's case.

ARGUMENT

POINT I
DISTRICT COURT ERRED IN ALLOWING PLAINTIFF'S COUNSEL TO WITHDRAW

DISTRICT COURT FAILED TO ENSURE THAT MANDATORY PROVISIONS, WHICH ARE CLASSIFIED AS IMPERATIVES UNDER RULE 74 UTAH RULES OF CIVIL PROCEDURE WERE FOLLOWED.

While appellants understanding is that Section 78-51-36, U.C.A. 1953 has been repealed, similar language is contained under Rule 74 Utah Rules of Civil Procedure. It is reasonable to conclude that Rule 74 was enacted to provide similar

if not identical protections. The court in *Utah Oil Co. v. Harris,* 565 P.2d 1135 (Utah 1977)

> "The foregoing clearly appears to have been enacted to safeguard a litigant who finds himself without counsel and prevents further proceedings until he again has counsel and chooses to proceed pro se. It is not a court directive nor does it exact any penalty against the litigant who fails for one reason or another to engage new counsel since, by its own terms, it affords him the alternative of appearing in person. Consequently, when a litigant does fail to engage new counsel, that, in and of itself, is not an adequate basis to default him or to dismiss as against him with prejudice."

The court first declares that the foregoing was "enacted to safeguard a litigant who finds himself without counsel and prevent proceedings until he again has counsel or chooses to proceed pro se." Simply put, the district court in this action should not have proceeded until either the appellants retained counsel or choose to proceed pro se. The later "choose to proceed pro se" is a clear issue that can be resolve first. Appellant, Mrs. Face made it clear to the court that "...We certainly do not want to be proceed pro se." I further made it clear that my husband could not appear or represent himself due to his disability. In fact, I provided the court with a letter indicating he "could not represent himself." by his physician.

Like in this action, neither appellants can or want to represent ourselves because we lack necessary skills to prosecute this action to a successful conclusion. That is the reason why we hired a professional. Appellant, Ms. Face made it clear

to the court that neither I nor my husband could represent ourselves. Especially considering, Mr. Face is disabled with a serious and debilitating brain injury.

The record reflects that appellant Mrs. Face made diligent and continued efforts to obtain an attorney, but could not find one. This was conveyed to the court. Therefore, under both of the aforementioned criteria the court should not have proceeded until one of the two conditions were met. This is where the district court clearly abused its discretion in dismissing this action.

Lastly, the court made it clear when it stated,

> "It is not a court directive nor does it exact any penalty against the litigant who fails for one reason or another to engage new counsel since, by its own terms, it affords him the alternative of appearing in person. Consequently, when a litigant does fail to engage new counsel, that, in and of itself, is not an adequate basis to default him or to dismiss as against him with prejudice."

The lower court failed to adhere to the high court directions. The lower court punished appellants because they did not or could not find counsel. The high court also made it clear that a court will not dismiss an action based solely on the failure to engage counsel. That is the exact reason why the lower court dismissed this action.

After having litigated this case to the filing of a questionable certificate of readiness for trial, the lower court states "…counsel for Plaintiffs informed the Court that he would be withdrawing as counsel." (R. 160 - 164 paragraph 7) Judge Lindberg does not refer to or cite which telephonic conference this matter relates

too. More importantly, appellant's counsel failed to motion the court and obtain an order for withdrawal, which is mandatory under Rule 74 U.R.C.P..[1]

No record of the September 15, 2005, conference has been made available. During a hearing held September 16, 2005, the court stated "...All right. I understand, Mr. Gruber, that you intend to withdraw?" Mr. Gruber responded "...I will withdraw at the direction of my clients, your Honor.". The record is silent as to appellants ever directing Mr. Gruber to withdraw. The court failed to require plaintiff's prior counsel to submit any motion for withdrawal to obtain court order allowing withdrawal as required which would have alerted us to the fact our counsel was withdrawing. This would have afforded us an opportunity to be heard. While everyone should be afforded this most reasonable accommodation, Mr. Face is disabled with a brain injury unable to represent himself (R. 135). Further, in addition to requiring a motion to withdraw, Rule 74 U.R.C.P. (2004) also required counsel to obtain an order from the court. The record is silent as to any motion or order for withdrawal. To be in compliance with Rule 74 U.R.C.P. appellants

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[1] Rule 74(a) of the Utah Rules of Civil Procedures (2005) states,
"If a motion is not pending or a certificate for readiness of trial has been filed, an attorney may withdraw from a case by filing with the court ands served upon all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no certificate of readiness for trial has been filed. If a motion is pending or certificate of readiness for trial has been filed, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing."

submit that we were entitled to notice of the motion so as to allow us an opportunity to be heard. Appellants submit that Mr. Gruber's statement "…I can assure you this isn't a tactic, and I know Terry knows this that I wouldn't do this, but it's not – it's my clients honestly want someone else." (R. 182 pages 3 & 4, lines 25, 26, 1) was a confession for we were not even aware this would or was taking place. Appellants can not understand the courts response "I'm not concerned about that.", "Yeah, not concerned about it at all." (R. 182 pages 4, lines 2 & 4). Mr. Gruber had obviously not filed a motion to withdraw based upon the record and his earlier statement ""I will withdraw at the direction of my clients, your Honor" (R. 182 page 2, lines 17 & 18). After a certificate of readiness was filed, why would the court consider allowing Mr. Gruber to withdraw absent any motion, questions or at least input by appellants?

BOTH COUNSEL FOR DEFENDANT AND PLAINTIFF'S (OFFICERS OF THE COURT) FAILED TO FOLLOW IMPARITIVE PROVISIONS UNDER RULE 74 UTAH RULES OF CIVIL PROCEDURES.

While both counsel for plaintiffs and defendants knew or should have known procedures required for withdrawal under Rule 74 U.R.C.P., neither officer of the court ensured that imperative provisions were complied with. Appellants sought transcript of the September 15, 2005, hearing of which no record has been made available (R. 176 - 177, 181). On September 16, 2005, one month following plaintiff having filed a certificate of readiness for trial without plaintiff's

knowledge, a hearing was held (R. 182) wherein the court stated "…All right. I understand, Mr. Gruber, that you intend to withdraw?" Mr. Gruber responded "…I will withdraw at the direction of my clients, your Honor." Again, at no time have appellants ever directed Mr. Gruber to withdraw (R. 130 - 134). When Mr. Gruber stated that my clients honestly want someone else…." The court responded "I'm not concerned about that." and followed it up with "Yeah, not concerned about it at all." (R. 182 page 4, lines 1 - 4). Respondent's counsel who had been attempting to settle this case, acknowledged having conversation, absent any motion for withdrawal, with Mr. Gruber stating "…Mr. Gruber explained that yesterday very well."(R. 182 pages 3, line 16). Respondents counsel then prompted the court to move forward (R. 182 page 4, line 6 - 8). When the Court asked "…if Mr. Gruber were to withdraw right now there would be an automatic 20 day period in which he would be required to give notice -- Mr. Plant responded "Right." (R. 182 pages 6, lines 8 - 11). Appellants have been unable to confirm Mr. Plant's verification to the court for Rule 74 U.R.C.P. does not state that our counsel is allowed 20 days to file notice but rather Rule 74 U.R.C.P. mandates that once the certificate of readiness for trial was filed, appellant's counsel may not withdraw without first filing a motion to withdraw and obtaining a court order. It is reasonable to conclude that said motion is designed to allow litigants an opportunity to be heard and lodge any objections. The record in this case is clear that plaintiff's prior

counsel filed a certificate of readiness for trial on 08-15-05 (R. 108 - 110). The record is silent that any motion for withdrawal was ever filed as required or does the record reflect any court order specifically granting any such motion. Respondent's counsel goes further to confuse issues by agreeing to prepare an order (R. 182 page 4, lines 17, 18, 25, 26, page 5, lines 25, 26, page 6, lines 1, 2, 3, 17, 18) consistent with directions of the court during the September 16, 2005 hearing. The record is silent as to any order in compliance with instructions of the court. Officers of the Court moved forward in a manner both arbitrary and capricious violating mandatory provisions set forth under Rule 74 (a) and (b) U.R.C.P. (2004) and lower court instructions. Instead, on September 28, 2005 respondents counsel obtained the court's signature of an order based upon September 15, 2005 (no record) requiring plaintiff's to appear or appoint counsel within seven (7) days on or before October 5, 2005. The following day Mr. Plant then files a notice to appear or appoint counsel within 20 days? We didn't even receive notices 20 days prior to scheduled October 18, 2005 hearing (R. 130 - 134).

POINT II
DISTRICT COURT ABUSED IT'S DISCRETION IN DISMISSING PLAINTIFF'S CLAIMS WITH PREJUDICE

DISMISSAL WITH PREJUDICE CLAIMING NO SUBSTANTIAL WORK ON CASE FOR EIGHTEEN (18) MONTHS WAS AN ABUSE OF DISCRETION

Judge Lindberg cited *Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975)(R. 160 - 164 paragraph 11) in her memorandum decision (R. 160-164 paragraph 11). Said case does not support dismissal with prejudice in this instance. In that case, supra, motion to dismiss for failure to prosecute was filed sixteen (16) months after commencement of the lawsuit (after no proceedings other than a motion to dismiss), wherein the court denied the motion. In this action, the record is replete with evidence that plaintiff's performed interrogatories, admissions, production of documents, subpoenas and depositions in addition to law and motion over the initial twenty (20) months (See Relevant Statement of Facts above). Under the above referenced case, approximately fifteen (15) months later (during which time some discovery took place) a second motion to dismiss was granted. The Supreme Court reversed and remanded for trial stating in part as follows (at page 879):

"it is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief

from default judgment where there isn't any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party."

It is our conclusion that the trial court failed to give proper weight to the higher priority; and that under the circumstances herein, the order of dismissal with prejudice was an abuse of discretion." (Emphases Added).

In addition to mere length of time since the suit was filed, lower court also cites five factors (R. 160-164, paragraph 11) to be utilized when determining whether or not justifiable excuse exists for the delay in moving the case along as set forth by the Utah Supreme Court, designed to help determine whether a party has shown a justifiable excuse for its failure to prosecute as follows:

1. conduct of both parties;

2. opportunity each party has had to move the case forward;

3. what each party has done to move the case forward;

4. the amount of difficulty or prejudice that may have been caused to the other side; and

5. most important, whether injustice may result from the dismissal.

When applying these rules to our case it appears that the scales tip heavily in favor of vacating the order of dismissal and remanding the case for further proceedings or in the alternative the dismissal be reversed and ordered as without prejudice to the commencement of a new lawsuit. (1) Based upon the record, appellant's do not understand or agree with lower court's assessment that "...what

discovery has occurred it appears to have been driven primarily by the defendants" (R. 160-164, paragraph 13). The record is clear that both parties pursued discovery of which appellant's initiated discovery (See Relevant Statement of Facts above). Appellants accommodated Appellees delays during discovery due to Mr. Mock's health condition through rescheduling of his deposition (R. 49 - 50, 53 - 54 and 65 - 66). While appellees may have performed more depositions, appellants bore costs and time necessary for Robert Face to undergo testing, diagnostics and evaluations of injuries through numerous physicians. Appellants take issue with lower courts averments that we failed to fulfill our repeated promises and was totally non responsive since February, 2006. We diligently sought new counsel. Who wants a case prepared by counsel who files a certificate for readiness of trial and then was allowed to abandon the case, which also has a lien filed against it. Appellants disagree with lower court's assumption "Defendants apparently ran out of patience and filed present motion…" (R. 160 - 164 paragraph 9). It was conveyed to appellants that the attorney reviewing our case in February, 2006 contacted Mr. Plant who just days thereafter filed the motion to dismiss knowing we were actively seeking replacement counsel, remembering the court advised "No problem, I will give you the time that you need.". In response appellants filed a motion for enlargement to have counsel respond, remembering that Mr. Face is disabled with a brain injury unable to represent himself. Respondent's motion

served to further frustrate and discourage any attorney from wanting to take the case. While the court accused us of being silent, it is our understanding that we only had ten days to respond to a motion which we did in filing the motion for enlargement. Appellees were silent in failing to respond or object until June, 2006. Appellants did not understand the process and were awaiting a response from either the court or respondent while seeking counsel as the court had instructed. Shortly after receiving respondents notice for decision we attempted to file a notice for decision on our pending motion learning that the case had been dismissed (See attached exhibit A above). Respondents conduct is transparent when reviewing their response to our motion for enlargement to file opening brief in this court. Facts were misrepresented while attempting to dictate to this court how much time a disabled person with a brain injury needs to prepare a brief of such complexity; (2) Appellants were definitely subjected to a distinct disadvantage after their counsel was allowed to withdraw because Mr. Face is disabled with a brain injury unable to act or represent himself (R. 135) while respondent on the other hand was allowed to ignore the court's order allowing us time to find counsel. In fact the week prior to the October 18, 2005 hearing, after Mr. Plant agreed to an extension he conveyed that our problem would be the court who wanted to get rid of our case. After the hearing, we felt Mr. Plant had misrepresented what was really going on. Respondents were also at a distinct advantage having deposed plaintiffs

knowing there financial situation prevented us from paying for counsel to appeal; (3) The record is silent as to ongoing settlement discussions other than defendants offer of judgment but does indicate appellees having done nothing since December, 2004 other than attend a telephone conference failing to prepare the order of the court as specifically agreed and advised during the September 16, 2005 hearing (See section B. below). Respondent also discontinued prospect of settling case. Why settle if one can succeed in getting the court to throw out opponent's case. After appellant's attorney filed certificate of readiness for trial 08-15-05 (R. 108 - 110) and was allowed to withdraw the following month (R. 117 - 120) the record is clear that appellant's continued to diligently seek counsel (R. 134 - 135, 182 page 4, lines 7 - 19, 141 - 143, 154 - 157). While both parties attended the October 18, 2005 telephonic conference appellees did nothing more to move case forward other than file a motion for dismissal. Appellants continued diligently seeking replacement counsel as instructed by the court (R. 134 - 135, 182 page 4, lines 7 - 19, 141 - 143, 154 - 157); (4) Appellants were subjected to extreme difficulties once their counsel was allowed to withdraw because Mr. Face is disabled with a brain injury unable to act or represent himself while appellees were at distinct advantage; (5) most important, appellants have been subjected to enormous injustice upon having our case foreclosed upon wherein significant time

energy and costs were expended as well as loosing relief sought while appellees reap the benefit of no further need to settle having escaped justice.

Appellants believe that respondents took advantage of the rotation of judges for if Judge Himonus felt we were beyond limits, we believe he would have called for a hearing prior to dismissing our case. As for time lapse from January, 2005, appellants were advised that the courts favor settlement of cases if possible. We had no idea that our case was at risk when it was dismissed based upon the court granting us the time we needed. We knew we were doing all possible to replace counsel. One can only imagine the chilling effect which would occur if litigants are discouraged from taking time necessary to attempt settlements for fear of having our cases dismissed for inaction. While dismissal under some of the cases cited in Westinghouse case, supra; justified dismissal such as *Thompson Ditch Co. v. Jackson*, 29 Utah.2d 259, 508 P. 2d 528 (1973) (dismissal after 8 years delay affirmed); and *Brasher Motor & Finance v. Brown*, 23 Utah.2d 247, 461 P.2d 464 (1969) (5 1/2 years delay with no activity justified dismissal) others cited do not such as *Crystal Lime & Cement Co. v. Robbins*, 8 Utah.2d 389, 885 P. 2d 624 (1959); (8 years delay did not authorize dismissal) and *Wright v. Howe*, 46 Utah 588, 150 P. 956 (1915) (3 year delay was insufficient). Our case was not subject to years of delays.

FAILURE TO OBTAIN COUNSEL

It is unjust to reward respondent with dismissal when they failed to prepare an order as agreed and specifically instructed by the court, move forward with withdrawal of counsel outside mandated provisions under Rule 74 U.R.C.P. failing to object to withdrawal or move the case forward themselves and then just days after receiving a call from counsel, plaintiffs were attempting to retain, motioned a new Judge for dismissal less than 120 days after Judge Himonus stated he would afford plaintiff's the time needed to obtain counsel. Respondents too had delayed the case through rescheduling defendant Mock's deposition to accommodate his health condition (See above). We did not understand Mr. Gruber's statement that the court forced said certificate rather it is apparent that he disappeared shortly thereafter. In January, 2005 discovery was near completion with exception to newly discovered information involving causation of Robert's brain injury as it related to the accident. Appellants attended appointments in January 2005 and Dr. Matsuo was evaluating further testing which we understand has not been completed. We were advised that our case was engaged in ongoing settlement discussions beginning in late 2004 within 60 days of having received respondent's offer of judgment (R. 101 - 102). Just prior to withdrawal we received information that our prior counsel, having been a sole practitioner, was unable to fulfill his contractual obligations at which time shortly thereafter we agreed to get a second

opinion to determine whether we should settle for an amount Mr. Gruber said appellees would accept. At no time did we discuss withdrawal which was accomplished absent our knowledge, consent and input. Both counsel moved forward with withdrawal absent their having objections. We provided the court with a letter from our primary physician who explained Mr. Face's inability to represent himself (R. 135) while Ms. Face informed the court during October 18, 2005 hearing "...We most certainly do not want to be pro se." (R. 183 page 4, lines 10 and 11). The court responded "No problem. I'll give you the time you need." (R. 182, page 4, lines 14 and 15). We interpreted the court's statement to mean just that. We diligently sought new counsel and continued to do so (R. 182, page 4, lines 7 - 10, 154 - 157).

TOTALITY OF CIRCUMSTANCES DOES NOT SUPPORT DISMISSAL WITH PREJUDICE AND WAS AN ABUSE OF DISCRETION

Under *Bullock v. Deseret Dodge Truck Center, Inc.,* 11 Utah.2d 1, 354, P. 2d 559, 561. when a party is subject to dismissal with prejudice based upon record, said dismissal must be supported by evidence when viewed in light most favorable to party subject to dismissal. That no genuine issue of material fact exists and the moving party is entitled to judgment of dismissal as a matter of law. When applying this rule to the facts of this case, one must conclude that no unreasonable delay occurred when appellants were engaged in genuine settlement discussions up

until shortly before their counsel was allowed to withdraw and had diligently performed discovery up through that same year. This case has not sat dormant in the court system for years but rather was actively pursued when possible. Totality of circumstances also tip the scales heavily in favor of vacating the order of dismissal and remanding the case for trial or in the alternative the dismissal should be ordered as without prejudice to the commencement of a new lawsuit. That appellants diligently sought counsel after our counsel had been allowed to withdraw which was our understanding as to what the court advised. Under *Martin v. Stevens*, 121 Utah 484, 243 P.2d 747. when* appraising a dismissal granted against appellants, we are entitled to have all the evidence reviewed, together with every logical inference which may fairly be drawn there from in the light most favorable to us. This was not a case of unreasonable neglect.

POINT III

PLAITIFF'S RIGHTS OF DUE PROCESS WERE VIOLATED IN HAVING BEEN DENIED OUR DAY IN COURT OR TO BE HEARD

Amendment V of the United States Constitution states, "No person shall…be deprived of life, liberty, or property, without due process of law; without due process of law." This is echoed through the 14th Amendment of the United States Constitution and our State Constitution.

The appellants through this action has had our due process rights violated. The most current and vital is the due process violation that encompasses and surround the withdrawal of their counsel.

Rule 74 U.R.C.P. states, "If a motion is not pending or a certificate for readiness of trial has been filed, an attorney may withdraw from a case by filing with the court and served upon all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no certificate of readiness for trial has been filed. **If a motion is pending or certificate of readiness for trial has been filed, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing.**"

In this action, a certificate of readiness for trial was filed with the court. Under the rules it specifically forbids an attorney from withdrawing from a case except upon motion and order of the court. The withdrawing counsel would be required to serve the motion upon the other parties to properly give notice of the impending withdrawal. Those parties would then be given an opportunity to respond and be heard concerning the matter.

In this case, appellants counsel did not prepare, execute or serve a motion to withdraw as is required under the rule. Counsel most definitely failed to notify the parties. The actions of appellees counsel, cited above, was just as abusive, underhanded and unethical tactics. This violated our rights to notice and to be heard. Both counsel failed to comply with the requirements while appellants counsel knew we did not fire or release him from his contractual obligations in this

action. Appellants counsel has breached the contractual agreement, which is binding in this case and appellants counsel knew the only way out of this action was to seek judicial approval. However, this does not negate the contractual obligations appellants counsel had with the appellants. Additionally, both counsel failed to comply with nearly every provision of the rule.

Rule 74 is a rule that utilizes an "Imperative." The rule clearly states, "…, an attorney may not withdraw except upon motion and order of the court." This did not happen.

Therefore, this alone should be reason for this court to reverse this action and remand it back to the trial court for further proceedings. It should also be grounds for this court to order Mr. Gruber's withdrawal null and void.

POINT IV

COURTS FAILURE TO ENSURE APPELLES WERE PROTECTED UNDER THE PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990 "ADA" WAS AN ABUSE OF DISCRETION

To qualify under the Americans with Disabilities Act of 1990 "ADA" a person must establish the following:

1. A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
2. A record of such an impairment; or
3. being regarded as having such an impairment.

In this action appellant, Ms. Face established by way of letter from our attending physician that Mr. Face has a severe brain injury. This letter meets the requirements of paragraph 1 and 2 above.

Based on this information, the court should have taken more reasonable steps in protecting his rights under this action. Instead the court effectively placed a tremendous ongoing burden on appellant's shoulders by allowing counsel to withdraw. Considering the facts of this action, the court for whatever reason then forced such drastic remedy as to dismiss action with prejudice, not even having held a hearing prior to doing so, to give appellants an opportunity to be heard and cite their understandings. The lower court acknowledges that this is a harsh remedy. The court was under a duty to protect the interests of appellants, especially because Mr. Face is disabled

POINT V

RESPONDENT'S ACTIONS WARRANT COST AND FEES

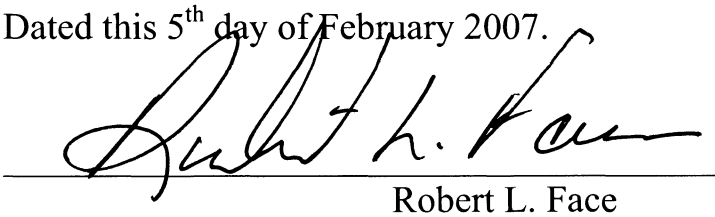
Based upon respondent moving forward in violation of strict mandates contained under Rule 74, U.R.C.P. for withdrawal of counsel, failure to prepare order of September 16, 2005 hearing as specifically agreed and instructed by the court, motioning new Judge for dismissal rather than first confer with plaintiffs, set for hearing or acknowledge Judge Himonas advisement that the court would give

plaintiff's the time needed to replace counsel appellants are seeking reimbursement of all costs and expenses.

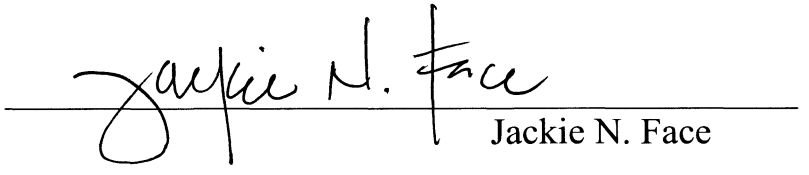
CONCLUSIONS

In conclusion, the appellants have been seriously harmed by and through the actions of the trial court including actions of both attorneys. Appellants respectfully request this court, in the interest of justice, to reverse the trial courts order dismissing this action with prejudice and remand back for further proceedings ordering Mr. Gruber's retention of counsel to allow appellants an opportunity to be heard. In the alternative, reverse and dismiss without prejudice to the commencement of a new lawsuit.

Dated this 5th day of February 2007.



Robert L. Face

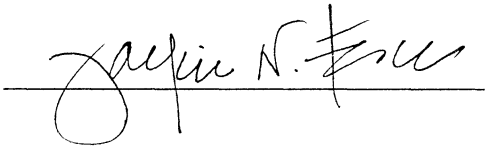


Jackie N. Face

CERTIFICATE OF SERVICE

I, Jackie N. Face, certify that on 02-05-07, I served a copy of the attached Opening Brief upon Terry M. Plant, the counsel for the appellees in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Terry M. Plant
PLANT CHRISTENSEN & KANEL
136 East South Temple Suite 1700
Salt Lake City, Utah 84111

By: 

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE DEPARTMENT

ROBERT AND JACKIE FACE ,

Plaintiffs,

vs

BEUTLER ENTERPRISES, INC , MOBILE HOME TRANSPORTERS, and BYRON CHESTER MOCK,

Defendants

MEMORANDUM DECISION GRANTING MOTION TO DISMISS FOR FAILURE TO PROSECUTE

Civ No 030905851

Judge Denise Posse Lindberg

¶1 At issue before the Court is Defendants' Motion to Dismiss for failure to prosecute After reviewing the parties' pleadings the Court GRANTS the Motion to Dismiss the case with prejudice, pursuant to Utah R Civ P 41(b)

FACTUAL BACKGROUND

¶2 This case involves a suit filed on or about March 14, 2003 by Plaintiffs Robert and Jackie Face alleging that defendants were negligent in the operation of a tractor-trailer causing personal injury to Mr Face, and a loss of consortium claim on behalf of Mrs Face

¶3 An attorney planning report and proposed scheduling order were submitted to the Court on or about May 13, 2003, but the Court declined to enter the Order because the proposed order exceeded the presumptive time limits provided for by Court rules In its minute entry declining to sign the proposed order the Court noted that absent good cause for delay, the case would have to be certified for trial within 330 days after the Answer was filed, or the it would be dismissed

¶4 An amended Case Management Order was approved by the Court on May 28, 2003 Pursuant to that Order the parties indicated to the Court that the matter would be ready for trial by March 5, 2004

¶5 The parties exchanged initial disclosures and conducted discovery through the balance of 2003 On or about December 23, 2003 the parties submitted a Stipulation and Joint Motion for a second amendment to the Case Management Order The Court accepted the stipulation and signed the proposed second amended Order That Order extended the readiness for trial date to October 1, 2004

¶6 Based on the case record it appears that discovery continued through January 25, 2005. After that date, no action appears to have taken place on the case, so the Court noticed the case for an Order to Show Cause ("OSC") why the case should not be dismissed for failure to prosecute. The OSC was scheduled for September 6, 2005. In response, Plaintiffs' counsel filed a certificate of readiness for trial and asked that the OSC hearing be stricken.

¶7 The Court then scheduled a telephonic conference with the parties, at which time counsel for Plaintiffs informed the Court that he would be withdrawing as counsel and Plaintiffs would secure new counsel. As a result of that telephonic conference the Court ordered that Plaintiffs find new counsel or appear *pro se* within 20 days. Pursuant to Utah R. Civ. P. 74, defendants filed their notice to appear or appoint successor counsel. A follow up telephonic scheduling conference was scheduled for October 18, 2005 to finalize what needed to occur to bring the matter to trial.

¶8 On the day prior to the scheduled telephonic conference, Plaintiffs filed a Motion for Enlargement of Time to Appoint Counsel, seeking a thirty (30) day extension. Defendants did not oppose that extension, and Plaintiffs were then given until November 18, 2005 to secure new counsel.

¶9 Again the day before that extension was to run out, Plaintiffs again filed another request for extension of time, this time asking for an additional 60 days. Although there is no express entry in the record, it appears that Defendants again acquiesced to the requested extension. However, by February 14, 2006, Defendants apparently ran out of patience and filed the present Motion to Dismiss for Failure to Prosecute pursuant to Utah R. Civ. P. 41(b).

¶10 On February 27, 2006, Plaintiffs filed a third affidavit and Motion for Extension of time, this time to respond to the Motion to Dismiss. Since that time, Plaintiffs have taken no further action to move this case forward. On June 16, 2006, Defendants filed a notice to submit on their motion to dismiss. Plaintiffs have not responded.

ANALYSIS

¶11 The plaintiff bears the duty to prosecute its case with due diligence. *Charlie Brown Constr. Co., Inc. v. Leisure Sports Inc.,* 740 P.2d 1368, 1370 (Utah Ct. App. 1987). If the plaintiff fails to prosecute its case with due diligence, a trial court has discretion to dismiss the plaintiff's case. *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975); *Charlie Brown Constr. Co., Inc.,* 740 P.2d at 1370. The Utah Supreme Court has set forth factors to help trial courts determine whether a party has shown a justifiable excuse for its failure to prosecute. In addition to the length of time that has lapsed, the relevant considerations are: "(1) the conduct of both parties; (2) the opportunity each party has to move the case forward; (3) what each party has done to move the case forward; (4) the amount of difficulty or prejudice that may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal." *Meadow Fresh Farms, Inc. v. Utah State Univ.*, 813 P.2d 1216, 1219 (Utah Ct. App. 1991); *accord Westinghouse Elec. Supply Co.*, 544 P.2d at 879. These factors are not to be considered in isolation. *Country Meadows Convalescent*

Ctr v Utah Dept of Health, Div Of Health Care Fin, 851 P 2d 1212, 1215 (Utah Ct App 1993) Rather, the totality of the circumstances should be considered when determining if an action should be dismissed for failure to prosecute with due diligence *Id*

¶12 As noted above, there has been no substantive action to move the case forward since January 2005 when defendants conducted the last of their depositions of Mr Face's treating physicians After the Court on its own motion scheduled the OSC hearing, the Plaintiffs' counsel certified the matter for trial and then withdrew Plaintiffs have been given extension after extension to secure new counsel, yet they have utterly failed to do so In fact, it is telling that they have not even attempted to respond to the Motion to Dismiss filed by Defendants in February 2006, other than to again ask for an extension of time

¶13 It has been more than three (3) years since the case was filed, more than eighteen (18) months since there was any substantive work on this case (and what discovery has occurred it appears to have been driven primarily by the defendants), and over nine (9) months since the Court initiated the OSC and Plaintiffs began seeking extensions of time The Court believes enough is enough It is evident Plaintiffs have failed to fulfill their repeated promises to the Court, and have been totally non-responsive since February 2006

¶14 As referenced above, in evaluating a motion to dismiss the Court must consider what actions, if any, were taken by each side in order to move the case forward In this case, Plaintiffs were clearly on notice of this Court's intention to manage its caseload and not allow matters to languish for years without action Once their counsel withdrew, Plaintiffs received repeated extensions to appoint new counsel, all the while protesting that they could not represent themselves

¶15 In contrast to Plaintiffs' inaction, it appears that the defendants have actively pursued this action They have engaged in substantial discovery, including deposing Mr Face's treatment providers

¶16 Defendants have not addressed how they will be prejudiced if this matter is continued, but that prong, by itself, is not determinative The burden was on Plaintiffs to show why dismissal would not be warranted on these facts, or to offer reasonable excuse for their lack of diligence Based on Plaintiffs' failure to respond to the motion to dismiss, and the fact they have remained silent for the subsequent 5 months since the motion was filed, the Court can reasonably conclude that Plaintiffs have nothing to offer that would justify their continued inaction

¶17 To be sure, a dismissal will prejudice the Plaintiffs, who will then be foreclosed from pursuing the relief sought However, the Court's sense of justice is not offended because of this outcome It was completely within Plaintiffs' control to act, and they chose not to do so The Court and defendants have been more than patient and accommodating to Plaintiffs' requests In short, any "injustice resulting from this dismissal lies solely and exclusively with Plaintiffs

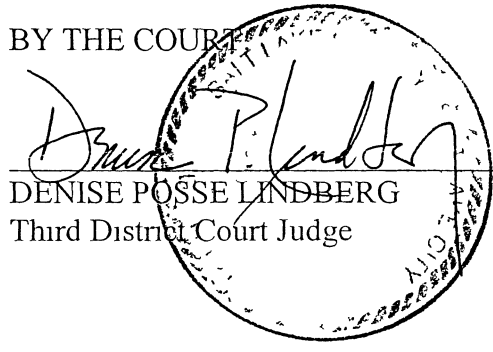
¶18 The Court realizes that dismissal with prejudice is a harsh sanction The facts of this case, however, amply justify this sanction

JUDGMENT AND ORDER

¶19 Defendants' Motion To Dismiss with prejudice is GRANTED. This memorandum decision shall serve as the final order and judgment in this case; the parties need not submit a separate order.

Entered this 28th day of June, 2006.

BY THE COURT:



DENISE POSSE LINDBERG
Third District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030905851 by the method and on the date specified.

METHOD	NAME
Mail	JACKIE FACE PLAINTIFF 619 North 200 East American Fork, UT 84003
Mail	ROBERT FACE PLAINTIFF 619 North 200 East American Fork UT 84003
Mail	TERRY M PLANT ATTORNEY DEF 136 SOUTH TEMPLE SUITE 1700 SALT LAKE CITY UT 84111

Dated this 29 day of June, 2006.

Michelle Baney
Deputy Court Clerk

EXHIBIT A

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT AND JACKIE FACE, Plaintiff BEUTLER ENTERPRISES, INC., MOBILE HOME TRANSPORTERS, and BYRON CHESTER MOCK, Defendants.	Civil No.: 030905851 Honorable Judge Lindberg

NOTICE TO SUBMIT FOR DECISION ON MOTION FOR ADDITIONAL TIME TO HAVE NEW COUNSEL RESPOND TO DEFENDANT'S MOTION TO DISMISS

Comes now the plaintiff's Robert and Jackie Face, who make an informal special appearance, pursuant to Rule 6(b) Utah Rules of Civil Procedures and moves the above entitled Court for an Order granting additional time to respond to Defendant's Motion to Dismiss dated February 13, 2006.

There having been no timely objection filed by defendants, plaintiff respectfully submits that this motion is ripe to be decided and that another attorney is currently reviewing this matter and could respond with this court's permission.

Dated this 27th day of June, 2006.

Robert Face

Jackie Face

CERTIFICATE OF SERVICE BY MAIL

I certify on this 27th day of June, 2006, I caused a true and correct copy of the foregoing "NOTICE TO SUBMIT FOR DECISION ON MOTION FOR ADDITIONAL TIME TO HAVE NEW COUNSEL RESPOND TO DEFENDANT'S MOTION TO DISMISS" to be delivered by inserting the above referenced document in a sealed envelope and placing the same in the United States Postal System addressed to the following:

____ US MAIL Postage Prepaid

PLANT, CHRISTENSEN & KANELL
Terry M. Plant
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

Robert Face

Jackie Face